

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
ETC Annual Reports and Certifications	)	WC Docket No. 14-58
	)	
Rural Broadband Experiments	)	WC Docket No. 14-259

To: Chief, Wireline Competition Bureau

**OPPOSITION OF  
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION  
TO NEW YORK STATE PETITION FOR EXPEDITED WAIVER**

The Wireless Internet Service Providers Association (“WISPA”) hereby strongly opposes grant of the Petition for Expedited Waiver (“Petition”) filed on October 12, 2016 by New York State through its Empire State Development (“ESD”) agency.<sup>1</sup> The Wireline Competition Bureau (“Bureau”) should swiftly dismiss or deny the Petition, the grant of which would result in New York unreasonably obtaining \$170.4 million in Connect America Fund (“CAF”) Phase II support – *six times* the amount of annual support that Verizon declined in New York State – and leave less than \$45 million in annual support available to bidders seeking support for the remaining states and territories.<sup>2</sup> Not only would grant of ESD’s brazen request be grossly unfair

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<sup>1</sup> See *Public Notice*, “Wireline Competition Bureau Announces Deadlines for Filing Comments and Replies Regarding New York State’s Petition for Expedited Waiver of the Connect America fund Phase II Auction Rules,” DA 16-1180 (rel. Oct. 13, 2016) (“*Public Notice*”). The *Public Notice* established October 24, 2016 as the deadline for filing of Comments. Accordingly, WISPA’s Opposition is timely filed.

<sup>2</sup> See *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 16-64, WC Docket Nos. 10-90, 14-58 & 14-259 (rel. May 26, 2016) (by context, “*R&O*” or “*FNPRM*”) at ¶ 79. It is unclear from the Petition whether ESD is seeking a lump sum payment of \$170.4 million, payment of \$170.4 million over six years (*i.e.*, \$28.4 million in declined support in New York times six years equals \$170.4 million), or \$170.4 million annually. It is also unclear if ESD is seeking funds Verizon declined in New York or that Verizon declined in every state. Compare Petition at 3 (referring to “Verizon’s 2015 decision to decline approximately \$170 million in Phase II CAF funding”) to Petition at 7 (referencing “the entire amount of CAF funding declined by Verizon (\$170.4 million) to New York”). Neither of these statements indicates that ESD is seeking only support that Verizon declined in *New York State*. See note 16, *infra*. The Bureau has apparently interpreted the waiver request

to consumers in other states and territories where support is needed, it would also be inconsistent with the policies and principles underlying the auction framework the Commission wisely adopted in the *R&O* and would set a dangerous precedent. Yes, the Bureau should act expeditiously, but only to dismiss or deny the Petition to ensure a fair and open nationwide reverse auction.

## **Discussion**

WISPA is a national trade association of small broadband providers that has forcefully advocated for CAF reverse auction rules that are technologically neutral, promote cost-effective deployment to unserved locations and encourage meaningful, robust participation by the largest possible number of qualified entities that wish to participate in the competitive bidding process. Although WISPA has a number of members in New York State that could possibly benefit from grant of ESD's Petition, no state or territory should be permitted to short-circuit the auction process and cause permanent harm to consumers in other jurisdictions.

### **I. THE BUREAU LACKS AUTHORITY TO GRANT THE WAIVER.**

Pursuant to Section 254 of the Communications Act of 1934, as amended, “only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support.”<sup>3</sup> Because ESD is not an eligible telecommunications carrier (“ETC”), it is statutorily ineligible to receive the direct support it seeks. Moreover, the state program guidelines that ESD cites in its Petition make support available to broad categories of applicants with no stated requirement that funded entities obtain ETC status, such that its program would appear to be a mechanism for funneling federal support

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as seeking “the amount of model-based support (approximately \$170.4 million) that *Verizon declined in the state....*” *Public Notice* at 1 (emphasis added).

<sup>3</sup> 47 U.S.C. § 254(e).

to entities not otherwise eligible to receive it.<sup>4</sup> Accordingly, the Bureau lacks statutory authority to grant the waiver, and must therefore dismiss it.

## **II. THE PETITION IS PROCEDURALLY DEFECTIVE AND SHOULD BE DISMISSED.**

Assuming *arguendo* the Bureau has statutory authority, it should dismiss the Petition on procedural grounds. In its Petition, ESD requests a waiver of the “competitive bidding process rules”<sup>5</sup> and makes general reference in a footnote to “various aspects of Section 54.312 *et seq.* of the Commission’s rules.”<sup>6</sup> ESD’s lack of specificity cannot overcome the fact that *there are no rules to waive*. To the contrary, ESD appears to be seeking waiver of rules the Commission *might* adopt in response to the *FNPRM*, which specifically asks for “comment on adopting alternative auction procedures designed to help ensure that declined states receive all or substantially all of the funds declined by the incumbent carrier.”<sup>7</sup> ESD and other states filed comments in response to the *FNPRM* proposing preferences for those states where the price cap carrier declined support,<sup>8</sup> oppositions to those proposals were submitted,<sup>9</sup> and the Commission is

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<sup>4</sup> See New NY Broadband Grant Program Request for Proposal Guidelines at 3, *available at* <http://nysbroadband.ny.gov/sites/default/files/documents/new-ny-broadband/New%20NY%20Broadband%20Program%20RFP%20Guidelines-%20FINAL.PDF>

<sup>5</sup> Petition at 15. Elsewhere, ESD simply refers more generally to a waiver of “the rules.” See, e.g., Petition at 7.

<sup>6</sup> *Id.* at 1, n.1. Section 54.312 addresses Phase I of the CAF rules for price cap categories and is inapposite to the competitive bidding rules for Phase II.

<sup>7</sup> *FNPRM* at ¶ 223. ESD’s complaint that the Commission’s proposals in the *FNPRM* did not adequately address “states’ funding” or “timing challenges” (Petition at 5) is unavailing given the Commission’s express invitation for “comment on advantages and disadvantages of each of these alternatives *as well as any other alternatives commenters suggest.*” *FNPRM* at ¶ 224 (emphasis added).

<sup>8</sup> See, e.g., Comments of New York State, WC Docket Nos. 10-90, 14-58 & 14-259 (filed July 21, 2016) (“ESD Comments”); Comments of the Pennsylvania Public Utility Commission, WC Docket Nos. 10-90, 14-58 & 14-259 (filed July 21, 2016); Joint Comments of the Massachusetts Department of Telecommunications and Cable and the Massachusetts Broadband Institute, WC Docket Nos. 10-90, 14-58 & 14-259 (filed July 21, 2016).

<sup>9</sup> See, e.g., Reply Comments of WISPA, WC Docket Nos. 10-90, 14-58 & 14-259 (filed Aug. 5, 2016) at 8 (“state-focused proposals . . . would distort the allocation of funding by subjecting it to factors other than cost or performance”); Comments of the National Rural Electric Cooperative Association and the Utilities Telecom Council, WC Docket Nos. 10-90, 14-58 & 14-259 (filed July 21, 2016) at 10 (“all remaining CAF II funds should be available in all states under the Phase II auction”); Comments of USTelecom, WC Docket Nos. 10-90, 14-58 & 14-259 (filed July 21, 2016) at 8 (opposing “auctions limited by state or a threshold that did not allow CAF II funding to be awarded where competitive forces direct it”); Comments of ITTA – The Voice of Mid-Size Communications

considering the record in advance of adopting rules. Because the waiver request appears to seek waiver of rules that have not been adopted, are not effective<sup>10</sup> and remain the subject of an ongoing rulemaking proceeding, the Bureau should dismiss the Petition as without basis. The policy issues upon which EDS seeks a ruling are already primed for action in the rulemaking proceeding, and the Commission should not undermine or prejudge that proceeding by allowing EDS's collateral attack upon it.

### **III. GRANT OF THE PETITION DOES NOT SATISFY THE "GOOD CAUSE" STANDARD AND WOULD BE CONTRARY TO THE PUBLIC INTEREST.**

Apparently concerned that the rulemaking process will not be resolved in its favor or within a time period commensurate with its wishes, ESD doubles down on the proposal contained in its Comments. There, ESD proposed that "*a carrier in an affected state* would be entitled to receive the declined CAF funding if it has partnered with the state to deploy high-speed broadband services in affected communities prior to the commencement of the CAF auction at speeds higher than those originally required of price cap carriers under the CAF."<sup>11</sup> In the Petition, however, ESD asks the Bureau to give *direct* support to the State of New York, which would then disburse the funds to broadband providers that meet certain Commission requirements.<sup>12</sup> As the basis for this extraordinary relief, ESD points to "the extended timeframe for commencement of the CAF auction," which it claims will compromise the "New NY Broadband Program," a statewide initiative to subsidize broadband deployment to unserved and

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Companies, WC Docket Nos. 10-90, 14-58 & 14-259 (filed July 21, 2016) at 11 (the Commission should "maximize the number of locations served via the auction, regardless of how individual states fared when incumbents were offered model-based support").

<sup>10</sup> See 81 Fed.Reg. 44414 (July 7, 2016) (stating that certain rules containing new or modified information collection requirements will not be effective until approved by the Office of Management and Budget).

<sup>11</sup> ESD Comments at 2 (emphasis added). See also *id.* at 7.

<sup>12</sup> See Petition at 7-8.

underserved areas of New York State.<sup>13</sup> According to ESD, “[l]ocal providers have informed ESD that CAF funding would be a key component of any plans to offer high-speed broadband in the affected communities. . . . The inability to align the Phase II CAF funding with the award of New York’s broadband program resources would result in the disparate federal and State funding of broadband in the affected communities.”<sup>14</sup>

New York must be commended for aggressively supporting broadband deployment via the New NY Broadband Program. Through its efforts and funding, tens of thousands of unserved and underserved households may obtain access to fixed broadband service.<sup>15</sup> However, New York’s desire to take *for itself* nearly 80 percent of the amount of annual CAF support, *six times* the amount of annual support that Verizon declined in New York, and potentially millions of dollars more than Verizon declined overall,<sup>16</sup> would be grossly unfair to consumers in every other state or territory where there are unserved locations. Not only would this result be egregious on its face, but it would also defeat the purpose of the CAF competitive bidding framework and set a dangerous precedent favoring one state over auction participants and all

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<sup>13</sup> *Id.* at 5.

<sup>14</sup> *Id.* at 6-7.

<sup>15</sup> WISPA notes that the speed criterion for the New NY Broadband Program differs from the CAF program, and other criteria may differ as well. *See* Petition at 2 (download speeds of 100 Mbps in most areas and 25 Mbps download speeds in very remote areas). Thus, some broadband providers eligible to participate in the CAF auction may be ineligible to participate in the New York program, and *vice versa*.

<sup>16</sup> *See id.* at 4, 7 (noting that Verizon declined \$28.4 million in annual CAF Phase II support in New York and \$170.4 overall). However, it is not clear how ESD calculated the total amount of support that Verizon declined and that ESD now seeks. *See Public Notice*, “Wireline Competition Bureau Announces Connect America Phase II Support Amounts Offered to Price Cap Carriers to Expand Rural Broadband,” DA 15-509 (rel. Apr. 29, 2015). The other states where Verizon declined the statewide commitment are Delaware (\$970,518), Florida (\$703,989), Maryland (\$6,909,138), Massachusetts (\$4,419,168), New Jersey (\$1,314,651), North Carolina (\$30,184), Pennsylvania (\$23,210,817), Rhode Island (\$166,060), Virginia (\$29,144,144) and Washington, DC (\$30,451). The total amount of support for these states is \$66,899,120. Verizon accepted support for California (\$31,978,057) and Texas (\$16,576,929) conditioned upon Frontier’s acquisition of Verizon subsidiaries in those two states. *See* Letter dated August 26, 2015 from Christopher Creager, SVP West Area Operations, Verizon, to Marlene H. Dortch, FCC Secretary, WC Docket No. 10-90. Although the Commission subsequently added certain categories of census blocks to the CAF Phase II auction, these additional blocks were not “declined” by Verizon. *See Public Notice*, “Wireline Competition Bureau Releases Preliminary List and Map of Eligible Census Blocks for the Connect America Phase II Auction,” DA 16-908 (rel. Aug. 10, 2016) (“*Preliminary List Public Notice*”) at 2-3.

other states and territories. Given these facts, ESD cannot meet the “good cause” standard of Section 1.3, and the Petition therefore must be denied.<sup>17</sup>

First, when the Commission transformed the Universal Service Fund in 2011, it expressed a desire “to design this [competitive mechanism] in a way that maximizes the extent of robust, scalable broadband service subject to our budget. Assigning support in this way should enable us to identify those providers that will make most effective use of the budgeted funds, thereby extending services to as many consumers as possible.”<sup>18</sup> In proposing rules, the Commission stated its “objective . . . to distribute the funds it has available for price cap areas where the incumbent ETC declines to make a state-level commitment in such a way as to bring advanced services to as many consumers as possible in areas where there is no economic business case for the private sector to do so.”<sup>19</sup> Carrying this fundamental objective forward, the Commission made clear in adopting the auction framework that “[w]e want to maximize the number of consumers served within our finite budget.”<sup>20</sup> Notwithstanding the consistency and clarity of these statements, ESD would have the Commission substitute ESD’s private objectives and the interests of consumers in a single state for the Commission’s overall mandate to promote ubiquitous service to unserved locations across the country.

Second, grant of ESD’s waiver request would undermine the public interest in facilitating federal-state coordination on broadband issues and encouraging additional state broadband investment.”<sup>21</sup> With respect to New York, no “additional state investment” would be encouraged given that New York has already decided to move forward with implementing the New NY

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<sup>17</sup> See, e.g., *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“An applicant for waiver faces a high hurdle even at the starting gate”).

<sup>18</sup> *Connect America Fund, et al.*, 26 FCC Rcd 17663, 17732 (2011) (footnote omitted).

<sup>19</sup> *Id.* at 18086.

<sup>20</sup> *R&O* at ¶ 16.

<sup>21</sup> Petition at 9.

Broadband Program with full knowledge that Verizon declined CAF support and irrespective of the uncertain rules and timing for the CAF Phase II auction. Even more illogical and incredible is ESD's argument that the "additional state investment" is intended to "spur other states to develop and implement their own broadband programs or enjoy a similar partnership yielding a beneficial outcome for the citizens of their state through co-investment and coordination."<sup>22</sup> Stated another way, with as little as \$45 million in annual support left over after ESD swallows up \$170.4 million,<sup>23</sup> numerous other states and territories are supposed to have the incentive to set up broadband subsidy programs and allocate more money for broadband deployment subsidies. This is an extremely dubious proposition given the relative paucity of funds that would remain for competitive bidding. Obviously, the Commission cannot "[p]artner[] with New York's broadband program" in a way that favors one state and "plays chicken" with the policy choices and budgets of the Commission and every other state and territory.<sup>24</sup> The more likely scenario is that there would be very little interest among bidders to fight over the relatively small amount of remaining support.

Third, ESD cannot credibly claim that "special circumstances arising from New York's broadband program" warrant waiver relief.<sup>25</sup> To its credit, New York made a voluntary decision to establish a program to expeditiously allocate broadband support, and did so with the knowledge that Verizon could decline Phase II support. New York's timing and policy choices are independent from the Commission's policy choices and the timing of its decisions, and the Commission is charged by statute to encourage broadband deployment to all Americans, not just

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<sup>22</sup> *Id.* at 12.

<sup>23</sup> *See* notes 2 & 16, *supra*.

<sup>24</sup> Petition at 10.

<sup>25</sup> *Id.* at 12.

those in New York.<sup>26</sup> If aligning the timing of New York's broadband program with the CAF reverse auction is critical to the success of the New NY Broadband Program, the better solution would be for New York to align its program with the federal program. While it is unfortunate that consumers in New York would need to wait for the Commission to finish its rulemaking proceeding, conduct the reverse auction, review auction winners' qualifications and award support, the time frame it will take for the Commission to complete these processes is entirely foreseeable and should not be surprising to ESD. Surely, the desire to evade normal Commission processes cannot be the basis for New York, and only New York, to obtain direct federal support outside the CAF auction process. Given the financial needs of service providers in other states and territories, ESD has provided no basis for the Commission to bend to New York's funding priorities. Indeed, it may be true that other states and territories are waiting for the Commission to schedule the CAF reverse auction before they move forward with their own plans, plans that would be gutted by the windfall that ESD seeks.

Fourth, granting the Petition would set a dangerous precedent that would, based on which state asked first, earmark federal CAF funding to a particular area. Any state or territory could implement a support program and ask the Commission to accelerate funding directly to them to align the two buckets of support. Assuming there is even enough money to go around, the reverse auction process would quickly devolve into a chaotic mess in which states extend their hand and the Commission fills it with support, to the detriment of private investment and the benefits of a reverse auction designed to award support to cost-effective bids. Taking this

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<sup>26</sup> See 47 U.S.C. § 1302.

scenario to its logical extreme, there would be no need for any reverse auction because there would be no money available.<sup>27</sup>

To the extent the Bureau even considers granting a waiver, it would be contrary to the CAF structure for the Commission to provide a block grant to state governments, as ESD requests. The CAF rules have always supported providers, with states exercising some level of regulatory governance such as processing of eligible telecommunications carrier applications. Aside from the seismic shift that would occur in the structure of the CAF program if the waiver were granted, directing block grants to states would set a bad precedent for future iterations of CAF funding by removing the benefits associated with a nationwide reverse auction that encourages private investment and cost-efficient deployment.

Consumers in New York are fortunate that the state is providing support for broadband deployment. That is not the case in other states, where consumers must rely solely on federal support. But a desire to coordinate the timing of state and federal support does not justify grant of a waiver that would undermine the entire CAF auction and deprive consumers in other states and territories the ability to obtain CAF support. Indeed, the need for federal support is greater where the state does not support, or only minimally supports, broadband deployment.

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<sup>27</sup> Assuming a worst-case interpretation of ESD's waiver request in which it seeks \$170.4 million *per year*, it is difficult to imagine a more one-sided result than the one EDS seeks. *See* note 2, *supra*. In that case, the Bureau would authorize 80 percent of the annual amount of CAF Phase II support to 76,580 unserved locations in New York, leaving bidders for the remaining 1,415,584 unserved locations in the remaining states and territories to compete for the remaining 20 percent. This level of federal support – and not to mention the state support – would be \$2,225 per unserved location in New York, about *six times more* than the \$391.17 annual cost-model amount for New York. *See Preliminary List Public Notice*. The national average cost is \$652.51 per year, demonstrating that other areas of the country have higher broadband costs and thus a greater need for federal support. Yet these other states and territories, where deployment costs are higher than in New York, would be subject to a process that would make only \$45 million annually available.

## **Conclusion**

For the reasons discussed above, the Bureau should dismiss or deny ESD's Petition. The Bureau and the Commission lack statutory authority to grant the Petition, which also apparently seeks waiver of rules that are still subject to rulemaking. If the merits of the Petition are considered, the Bureau must avoid the unfair consequences to consumers and prospective bidders that would inure from a direct giveaway of a large amount of available CAF support to a single state. Commission policies strongly disfavor deviation from precedent and the parochial favor that ESD requests.

Respectfully submitted,

**WIRELESS INTERNET SERVICE  
PROVIDERS ASSOCIATION**

October 24, 2016

By: */s/ Alex Phillips*, President  
*/s/ Mark Radabaugh*, FCC Committee Chair

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**CERTIFICATE OF SERVICE**

I, Sharon Krantzman, hereby certify that on this 24<sup>th</sup> day of October, 2016, a true and correct copy of the foregoing Opposition was sent by first-class, postage prepaid mail to the following:

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